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SOUTH CAROLINA
COMMISSION

October 29, 2004

VIA HAND DELIVERY

The Honorable George Dorn
Interim Executive Director
The Public Service Commission of South Carolina
100 Executive Center, Suite 100
Synergy Complex, Saluda Building
Columbia, South Carolina 29211

Re: Docket No. 2004-178-E
Application of South Carolina Electric & Gas Company
for an Increase in Electric Rates and Charges
Our File No. 4381.203

Dear Mr. Dorn:

On behalf of South Carolina Electric and Gas Company, please find enclosed for filing, an original and sixteen (16) copies of *SCE&G's Response to Columbia Energy's Motion to Strike*, in the above-referenced matter. Certificates of Service are attached reflecting service on all parties of record.

Please be kind enough to date-stamp and return the extra copies of each of these documents via the bearer of this letter.

Thank you for your assistance.

Respectfully Submitted,

Catherine D. Taylor

CDT/cw

Enclosures

cc: All Parties of Record

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2004-178-E

IN RE:

Application of South Carolina Electric
& Gas Company for Adjustments in
the Company's Electric Rate Schedules
and Tariffs

CERTIFICATE OF SERVICE

I, Hannelore Wilson, the undersigned employee of South Carolina Electric & Gas Company, hereby certify that I have this 29th day of October, caused a copy of *SCE&G's Response to Columbia Energy's Motion to Strike*, which has been filed on behalf of South Carolina Electric & Gas Company, in the above-referenced docket, to be served on all parties of record whose names appear below via U. S. Mail (unless otherwise indicated):

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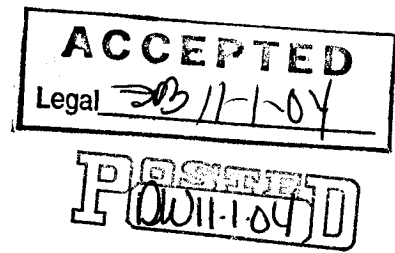
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(Name)

Columbia, South Carolina
October 29, 2004.



STATE OF SOUTH CAROLINA

BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2004-178-E

IN RE:

Application of South Carolina)
Electric & Gas Company for
Adjustments in the Company's
Electric Rate Schedules and
Tariffs

**SCE&G'S RESPONSE TO
COLUMBIA ENERGY'S
MOTION TO STRIKE**

By its undersigned counsel, South Carolina Electric & Gas Company ("SCE&G" or "Company") hereby opposes Columbia Energy LLC's ("Columbia Energy's") Motion to Strike portions of the Rebuttal Testimony of Neville O. Lorick on the basis that (1) the testimony is not hearsay as defined by South Carolina Rule of Evidence 801(c) and (2) even if the testimony was hearsay, it would meet a stated exception to the rule. The Company also provides the attached affidavit as additional support for Mr. Lorick's testimony. For the reasons stated herein, the Company requests that the Public Service Commission of South Carolina ("Commission") deny Columbia Energy's Motion.

**I. EVEN ASSUMING ARGUENDO THE STATEMENTS WERE HEARSAY,
THEY DEMONSTRATE COLUMBIA ENERGY'S STATE OF MIND, A
RECOGNIZED EXCEPTION TO THE HEARSAY RULE AND ARE
ADMISSIBLE INTO EVIDENCE**

Even assuming, *arguendo*, the statements are hearsay, they are admissible under the state-of-mind exception to the hearsay rule. Evidence offered to prove the state of mind of the declarant is not hearsay because such evidence would make the declarant's state of mind more or

less probable without regard to the truth of the declaration. *Wilburn v. Minnesota Mut. Life Ins. Co.*, 261 S.C. 568, 201 S.E.2d 372 (1973). As stated in Rule of Evidence 803(3), “a statement of the declarant’s then existing state of mind, emotion, sensation or physical condition (such as **intent, plan, motive**, design, mental feeling, pain, and bodily health). . . .” is not excluded by the hearsay rule.

Evidence to show the declarant’s state of mind has been admitted in numerous instances, including: . . . a statement or conduct to show anxiety or apprehension, *State v. Lewis*, 293 S.C. 107, 359 S.E.2d 66 (1987), . . . and . . . a statement or threat to show ill will. *State v. Griffin*, 277 S.C. 193, 285 S.E.2d 631 (1981). . . Evidence of state of mind, like reasonableness of subsequent conduct, must be relevant before it is admissible.

In the instant case, Columbia Energy represented that it was ready, willing and able to enter into a long-term supply contract with SCE&G, and that if SCE&G did not accept its offer, Columbia Energy would retaliate against the Company. Thus, the statements are relevant on the issue of Columbia Energy’s intent, plan or motive. Columbia Energy’s employees and its attorney acting on behalf of Columbia Energy are the acts of the company. Mr. Lorick offers the evidence in question for the purpose of explaining Columbia Energy’s state of mind, a recognized exception to the hearsay rule. Thus, Columbia Energy’s Motion to Strike should be denied.

II. THE TESTIMONY IN QUESTION DOES NOT MEET THE DEFINITION OF “HEARSAY”

South Carolina Rule of Civil Procedure 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.” The relevant portion of Mr. Lorick’s testimony reads as follows:

Columbia Energy’s independent power generation project in SCE&G’s service territory is a co-generation project with one of SCE&G’s largest customers, Carolina Eastman Company (now Vordian). At the outset, Columbia Energy made it abundantly clear that they were not interested in any commitment to sell power

to SCE&G, based on the market strategy I have just discussed. Consequently, Columbia Energy entered into a written agreement with SCE&G waiving its Public Utility Regulatory Policy Act (PURPA) rights to put the QF power to SCE&G, and correspondingly, SCE&G agreed not to oppose the siting of the Columbia Energy facility by the PSC.

Again, for the reasons I discussed in my answer to the previous question, Columbia Energy has now indicated its intent to void its agreement with SCE&G and has attempted to force a power purchase agreement with the Company. When the Company declined to enter into such an agreement, Columbia Energy made it clear that it would retaliate by intervening in the present proceeding. They have also intervened in Docket No. 2004-126-E, involving our gas supply contract for the Jasper facility. Columbia Energy has told our Company that if SCE&G would agree to purchase 200-300 MW of power for approximately four to six years, until the wholesale market has recovered, Columbia Energy would drop its intervention in this rate case and possibly our Jasper Fuel Contract case.

While the statements attributed to Columbia Energy are offered into evidence by someone other than the SCE&G employees who heard them, they are *not* being offered for their truth. Moreover, parts of the highlighted statements constitute a verbal act, which has independent legal significance and, by definition, is not hearsay.

A. The Statements Are Not Being Offered For Their Truth

Under South Carolina law,

out of court assertions are not hearsay unless used to prove the truth of the assertion. . . . Such assertions may be used to show that a statement was made or that a document is in existence. . . . When used to prove something other than the truth of the assertion, the evidence must have probative value on some issue in the case without regard to its veracity.

Danny R. Collins, *South Carolina Evidence* § 16.7(A), SC Bar CLE Division.

Evidence offered that a statement was made without regard to the truth of the statement is

not hearsay. *State v. Tabor*, 260 S.C. 355, 196 S.E.2d 111 (1973).

The statements made by Columbia Energy are important whether or not they are true. The statements, even if false, tend to explain or identify reasons for Columbia Energy's intervention and participation in the hearing now underway. Thus, they are relevant whether true or false. As stated above, however, if the statements are not being offered for their truth, they cannot be defined as hearsay.

B. The Statements in Question Constitute A Verbal Act With Independent Legal Significance.

Hearsay does not encompass all extrajudicial statements but only those offered for the purpose of proving the truth of the matters asserted in the statement. . . . Therefore, when the mere making of the statement is the relevant fact, *i.e.*, tends to establish a fact of consequence, . . . hearsay is not involved. Such statements are frequently said to be **offered solely for the fact said and not for the truth of the matter asserted, *i.e.*, their contents.** . . .

As to one group of extrajudicial statements falling outside the category of hearsay, the statement itself, **the verbal act, has independent legal significance.** Thus, testimony by an agent as to a statement by the principal granting him authority to act as agent is not hearsay. Other illustrations include statements constituting contracts. . . .

M. Graham, *Federal Practice & Procedure, Evidence* § 7005 (Interim Edition 2000), (emphasis supplied). *See also, West Coast Truck Lines v. Arcata Community Recycling*, 846 F.2d 1239, 1246 n.5 (9th Cir.1988), cert. denied, 488 U.S. 856 (1988)(“West Coast argues on appeal that evidence regarding an oral agreement to charge the reduced rates was inadmissible hearsay. This argument is without merit. Evidence of an oral offer is not offered to prove the truth of the matter stated. Rather, such evidence is offered simply to show that the offer was made. It is well established that statements which may themselves affect the legal rights of the parties are not

considered hearsay under the Federal Rules of Evidence.”); *Mueller v. Abdonor*, 972 F.2d 931, 937 (8th Cir. 1992) (“A contract, for example, is a form of verbal act to which the law attaches duties and liabilities and therefore is not hearsay.”)

Because SCE&G is offering the statements (1) without regard for their truthfulness, and (2) as a verbal act, the statements are not hearsay and should be admitted into evidence over any hearsay objection.

III. THE CHALLENGED STATEMENTS ARE SUPPORTED BY AN AFFIDAVIT

Columbia Energy also complains that Rule 602 requires an additional foundation for Mr. Lorick’s testimony (*See* attached Affidavit, marked Exhibit 1) and SCE&G’s corporate knowledge, as testified to by its President and Chief Executive Officer. Although SCE&G believes Mr. Lorick’s testimony to be complete on its own, the Company supplies the attached supporting affidavit pursuant to S.C.Rule of Evidence 902(8). Under that rule, “documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized to take acknowledgments,” affidavits of the type attached are “self authenticating.” The affidavit is signed by Mr. Stephen Cunningham, an SCE&G employee who reports directly to Mr. Lorick and supports Mr. Lorick in his duties as President and Chief Executive Officer of SCE&G. It is axiomatic that

the principal is bound by the acts of its agent when it places the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe that the agent has certain authority and they in turn deal with the agent based upon that assumption.

Rickborn v. Liberty Life Insurance Company, 321 S.C. 291, 297, 468 S.E.2d 292 (S.Ct. 1996).

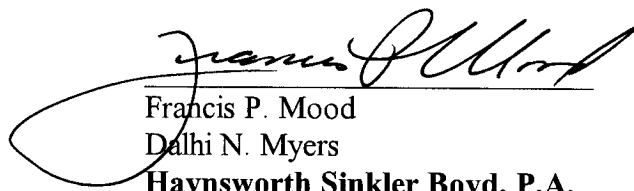
SCE&G as a company only acts through its employees. *See, Morris v. Mooney*, 288 S.C. 447,

343 S.E.2d 442 (S.Ct.1986). Mr. Cunningham, as disclosed in his affidavit, reported the contents of his meeting to his boss, Mr. Lorick, which forms the basis of Mr. Lorick's testimony. As the statements are not being offered for their truth, defeating the hearsay objections (Sections I and II above), the additional foundation provided by Mr. Cunningham's affidavit is more than sufficient to allow Mr. Lorick's testimony as to what *the Company* believes concerning Columbia Energy's motives.

IV. CONCLUSION

For the reasons stated herein, SCE&G respectfully requests that the Commission deny Columbia Energy's Motion To Strike, and for such other relief as may be just and proper.

Respectfully Submitted,



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October 28, 2004

Exhibit 1

.

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 2004-178-E

IN RE:)
)
)
Application of South Carolina Electric)
& Gas Company for Adjustments in)
the Company's Electric Rate Schedules)
and Tariffs)
_____)

AFFIDAVIT OF
STEPHEN M. CUNNINGHAM

(October 26, 2004)

AFFIDAVIT OF STEPHEN M. CUNNINGHAM

STATE OF SOUTH CAROLINA)
) ss.
COUNTY OF RICHLAND)

Stephen M. Cunningham being duly sworn upon oath, hereby deposes and states as follows:

1. I am the Manager of New Project Development for South Carolina Electric & Gas Company (SCE&G). In that capacity, I am responsible for the development of new electricity generation projects like the Jasper Facility.
2. I make this Affidavit of my personal knowledge.
3. On June 16, 2004, I, along with other representatives of SCE&G, participated in a meeting with representatives of Calpine Corporation (Calpine) (held at Calpine's request) in the offices of SCE&G.
4. The following participants were present: Marcus M. Harris and William F. Henze II, representing SCE&G and Paul Barnett, Don Walters and Frank Ellerbe (counsel to Calpine) representing Calpine.
5. At this meeting, SCE&G stated that it would continue to make short term purchases of economy energy from Calpine when the energy offered by Calpine was needed and economic relative to other alternatives.

6. Mr. Barnett then restated Calpine's belief (originally stated on May 26, 2004, in a meeting between the same parties) that its qualifying facility (QF) waiver with SCE&G was invalid.

7. Mr. Barnett proposed that SCE&G enter into a mid term (4-6 year) Power Purchase Agreement (PPA) with Columbia Energy Center for 200-300 MW of capacity with a heat rate of 7000 Btu/kwh at market pricing, and agree to terminate the QF waiver agreement at the end of the suggested PPA term, or when SCE&G decided to add new capacity, whichever was earlier.

8. Mr. Barnett further stated that, if SCE&G agreed to a firm contract, as described in Paragraph 7 above, Calpine would drop its planned intervention in the recently noticed SCE&G Rate Case, Docket No. 2004-178-E, and possibly its intervention in SCE&G's Jasper Supply Docket, No. 2004-126-E.

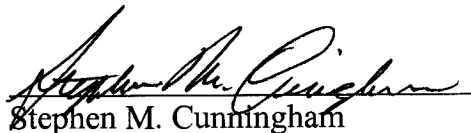
9. Mr. Barnett described Calpine's intervention in SCE&G's Jasper Supply Docket as a "warm-up" for the "main event," SCE&G's Rate Case.

10. Following the meeting, I relayed the substance of our meeting to my immediate supervisor, Mr. Neville O. Lorick.

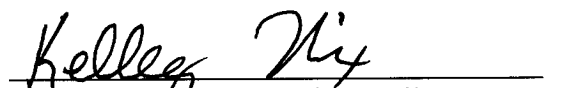
11. SCE&G decided not to accept Calpine's offer because the Company did not require additional capacity during the requisite term.

12. Some time later, I learned that Calpine had intervened in SCE&G's Rate Case.

FURTHER AFFIANT
SAYETH NAUGHT.


Stephen M. Cunningham

Subscribed and sworn to before me
this twenty-sixth day of October, 2004.


Notary Public for South Carolina
My Commission Expires: 8-21-05